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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
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11 JOSEPH HARVEY FONTAINE,  
12 Petitioner,  
13 v.  
14 JOSEPH W. MOSS,  
15 Respondent.

Case No. CV 15-0728 SS

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**MEMORANDUM DECISION AND ORDER  
DENYING HABEAS CORPUS PETITION**

**I.**

**INTRODUCTION**

Effective December 31, 2014,<sup>1</sup> Joseph Harvey Fontaine ("Petitioner"), a California state prisoner proceeding pro se, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 ("Petition") in the United States District Court for the

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<sup>1</sup> "When a prisoner gives prison authorities a habeas petition or other pleading to mail to court, [pursuant to the mailbox rule,] the court deems the petition constructively 'filed' on the date it is signed[,]" Roberts v. Marshall, 627 F.3d 768, 770 n.1 (9th Cir. 2010); Houston v. Lack, 487 U.S. 266, 276 (1988), which in this case was December 31, 2014.

1 Southern District of California, which transferred the Petition to  
2 this Court on January 30, 2015. (Dkt. Nos. 1, 3-4).

3  
4 On April 20, 2015, Respondent filed a Motion to Dismiss  
5 ("Motion") the Petition and lodged portions of the record from  
6 Petitioner's state court proceedings.<sup>2</sup> (Dkt. Nos. 11-12). On  
7 March 28, 2016, the Court denied the Motion without prejudice and  
8 required Respondent to lodge additional state court documents.  
9 (Dkt. No. 20).

10  
11 On April 21, 2016, Respondent filed a Renewed Motion to  
12 Dismiss Petition for Writ of Habeas Corpus ("Renewed Motion") with  
13 an accompanying Memorandum of Points and Authorities ("Mot. Mem.").  
14 (Dkt. No. 21). Respondent also lodged additional portions of the  
15 record from Petitioner's state court proceedings, including a one-  
16 volume copy of the Clerk's Transcript ("CT") and a three-volume  
17 copy of the Reporter's Transcript ("RT") from Petitioner's trial.  
18 (Dkt. No. 22). Petitioner has not filed an Opposition to the  
19 Renewed Motion despite being given additional time to file his  
20 Opposition. (See Dkt. No. 23). For the reasons discussed below,  
21 the Court GRANTS the Motion and DISMISSES this action with  
22 prejudice.<sup>3</sup>

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25  
26 <sup>2</sup> Pursuant to Fed. R. Evid. 25(d), Joseph W. Moss is substituted  
27 as the Respondent in this action. (See Renewed Motion to Dismiss  
28 Petition for Writ of Habeas Corpus at 1).

<sup>3</sup> The parties have consented to proceed before a Magistrate Judge.  
(See Dkt. Nos. 1, 10, 17).

1 II.

2 PRIOR PROCEEDINGS

3  
4 On October 3, 2012, a Los Angeles County Superior Court jury  
5 convicted Petitioner of one count of corporal injury to the mother  
6 of his child in violation of California Penal Code ("P.C.") §  
7 273.5(a) (count 1), and Petitioner admitted he had suffered a prior  
8 "strike" conviction within the meaning of P.C. §§ 667(b-i) and  
9 1170.12(a-d), had sustained a prior serious felony within the  
10 meaning of P.C. § 667(a)(1), and had served four prior prison terms  
11 within the meaning of P.C. § 667.5(b).<sup>4</sup> (CT 91, 94-95; RT 1228-  
12 30, 1235-37). On October 24, 2012, the trial court sentenced  
13 Petitioner to ten years in state prison. (CT 111-12, 115; RT 1511-  
14 12).

15  
16 Petitioner appealed his convictions and sentence to the  
17 California Court of Appeal (Second Appellate District, Div. 3),  
18 which affirmed the judgment in an unpublished opinion filed on  
19 March 19, 2014. (Lodgments 2, 7-9). Petitioner did not file a  
20 petition for review in the California Supreme Court. (Petition at  
21 2).

22  
23 Effective June 18, 2014, Petitioner filed a habeas corpus  
24 petition in the California Supreme Court, which denied the petition  
25 on September 24, 2014, with citation to People v. Duvall, 9 Cal.

26  
27 <sup>4</sup> The jury found Petitioner not guilty of dissuading a witness  
28 from reporting a crime in violation of P.C. § 136.1(b)(1) (count  
2), and criminal threats in violation of P.C. § 422 (count 3). (CT  
92-93, 96).

1 4th 464, 474 (1949), In re Waltreus, 62 Cal. 2d 218, 225 (1965),  
2 In re Swain, 34 Cal. 2d 300, 304 (1949), and In re Lindley, 29 Cal.  
3 2d 709, 723 (1947). (Lodgment 3; Petition at 56).

### 4 5 **III.**

#### 6 **FACTUAL BACKGROUND**

7  
8 The following facts, taken from the California Court of  
9 Appeal's written decision on direct review, have not been rebutted  
10 with clear and convincing evidence and must, therefore, be presumed  
11 correct. 28 U.S.C. § 2254(e)(1); Slovik v. Yates, 556 F.3d 747,  
12 749 n.1 (9th Cir. 2009).

#### 13 14 1. Prosecution Evidence

15  
16 Nicole D., [Petitioner's] girlfriend and mother of  
17 his daughter, was pregnant with their second child.  
18 Since [Petitioner's] release from custody in December  
19 2011, he had been living with Nicole and their daughter  
20 in his mother Linda's house along with Linda's partner,  
21 Patricia Jam. [Petitioner] has a long history of  
22 methamphetamine abuse and mental illness.

23  
24 On June 4, 2012, [Petitioner] had been away from  
25 the house for four days. When he returned, Nicole  
26 happened to be on the phone talking to Linda about  
27 [Petitioner's] absence. [Petitioner] ran into the  
28 bedroom, grabbed Nicole around the neck and struggled

1 with her for the telephone. During the struggle  
2 [Petitioner] hit Nicole in the face.  
3

4 Nicole had some redness around her neck where  
5 [Petitioner] grabbed her, and some redness and painful  
6 swelling on her cheek where she was hit. Jam testified  
7 she saw a red mark on Nicole's jaw or cheek, a red mark  
8 on her neck, and a thumbprint on the side of her neck.  
9 One of the responding officers, Los Angeles County  
10 Sheriff's Deputy Megan Behounek, saw some redness on  
11 Nicole's neck and face, and thought the right side of  
12 Nicole's face seemed swollen. Behounek took photographs  
13 and made a video recording of Nicole's injuries.  
14

15 Defense Evidence  
16

17 [Petitioner] testified that on June 3 he returned  
18 to the house at 11:30 p.m. after having smoked  
19 methamphetamine. Linda would not let him inside, because  
20 she was enforcing an 8:30 p.m. curfew, so [Petitioner]  
21 spent the night on a bench in the front yard.  
22

23 The next morning, [Petitioner] was allowed into the  
24 house when Linda and Jam got up for work. He plugged in  
25 his cell phone and went to sleep. When he awoke he  
26 discovered Nicole using the phone. Because she ignored  
27 him when he asked for it, he grabbed her neck and snatched  
28

1 the phone away from her. However, he did not hit her  
2 and he never saw any injuries on her.

3  
4 (Lodgment 2 at 2-3 (footnotes omitted)).

5  
6 **IV.**

7 **PETITIONER'S CLAIMS**

8  
9 The Petition raises three grounds for federal habeas relief.  
10 In Ground One, Petitioner contends he was denied due process of  
11 law because there was insufficient evidence to support his  
12 conviction for inflicting corporal injury on the mother of his  
13 child. (Petition at 6-30). In Ground Two, Petitioner alleges he  
14 was denied due process of law because Nicole D., the victim and  
15 key witness against him, perjured herself. (Id. at 31-53). In  
16 Ground Three, Petitioner asserts he received ineffective assistance  
17 of counsel when his defense counsel: (a) failed to investigate and  
18 properly prepare for trial; (b) allowed substitute counsel to sit-  
19 in for her and represent Petitioner at his preliminary hearing;  
20 (c) failed to object to the prosecution's presentation of the  
21 victim's perjured testimony; and (d) failed to request a stay of  
22 proceedings during trial to investigate and address recently  
23 discovered evidence of possible "out-of-court relations" between  
24 the prosecutor and a Los Angeles County Sheriff's Deputy who was a  
25 witness in the case. (Id. at 54).

## V.

## DISCUSSION

A. Petitioner Has Procedurally Defaulted Ground One

Federal courts “will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.” Coleman v. Thompson, 501 U.S. 722, 729 (1991); Walker v. Martin, 562 U.S. 307, 315 (2011). The procedural default doctrine, which is a specific application of the general adequate and independent state grounds doctrine, Fields v. Calderon, 125 F.3d 757, 761-62 (9th Cir. 1997), “bar[s] federal habeas [review] when a state court declined to address a prisoner’s federal claims because the prisoner had failed to meet a state procedural requirement.” Coleman, 501 U.S. at 729-30; Hanson v. Mahoney, 433 F.3d 1107, 1113 (9th Cir. 2006). To constitute a procedural bar, the state’s rule had to be independent and adequate at the time Petitioner purportedly failed to comply with it. Fields, 125 F.3d at 760. A state procedural rule is considered an independent bar if it is not interwoven with federal law or dependent upon a federal constitutional ruling. Ake v. Oklahoma, 470 U.S. 68, 75 (1985); Michigan v. Long, 463 U.S. 1032, 1040-41 (1983). A state procedural rule constitutes an adequate bar to federal court review if it was “firmly established and regularly followed” at the time the state court applied it. Ford v. Georgia, 498 U.S. 411, 423-24 (1991); King v. Lamarque, 464 F.3d 963, 965 (9th Cir. 2006).

1 Procedural default is an affirmative defense, Gray v.  
2 Netherland, 518 U.S. 152, 165-66 (1996); Insyxiengmay v. Morgan,  
3 403 F.3d 657, 665 (9th Cir. 2005), "and the state has the burden  
4 of showing that the default constitutes an adequate and independent  
5 ground." Insyxiengmay, 403 F.3d at 665-66; Bennett v. Mueller,  
6 322 F.3d 573, 585 (9th Cir. 2003). However, "[o]nce the state has  
7 adequately pled the existence of an independent and adequate state  
8 procedural ground as an affirmative defense, the burden to place  
9 that defense in issue shifts to the petitioner." Bennett, 322 F.3d  
10 at 586; King, 464 F.3d at 966-67. "The petitioner 'may satisfy  
11 this burden by asserting specific factual allegations that  
12 demonstrate the inadequacy of the state procedure, including  
13 citation to authority demonstrating inconsistent application of  
14 the rule.'" King, 464 F.3d at 967 (quoting Bennett, 322 F.3d at  
15 586). "Once a petitioner has demonstrated the inadequacy of a  
16 rule, the state bears the ultimate burden of proving the rule bars  
17 federal review." Collier v. Bayer, 408 F.3d 1279, 1284 (9th Cir.  
18 2005); King, 464 F.3d at 967.

19  
20 Respondent raises the affirmative defense that Ground One is  
21 procedurally defaulted. (Mot. Mem. at 10-15). The Court looks to  
22 the decision of the last state court to which Petitioner presented  
23 his claims to determine if the state court decision rested on an  
24 "independent and adequate state ground." Coleman, 501 U.S. at 730;  
25 see also Nitschke v. Belleque, 680 F.3d 1105, 1109 (9th Cir. 2012)  
26 (Under "the doctrine of procedural default, . . . a federal court  
27 is barred from hearing the claims of a state prisoner in a habeas  
28 corpus proceeding when the decision of the last state court to

1 which the prisoner presented his federal claims rested on an  
 2 'independent and adequate state ground.'" (citation omitted)).  
 3 Here, Petitioner raised Ground One in a habeas corpus petition to  
 4 the California Supreme Court, which denied the petition with  
 5 citation to several cases, including In re Lindley, 29 Cal. 2d 709,  
 6 723 (1947). (Petition at 56). A citation to Lindley "stands for  
 7 the California rule that a claim of insufficiency of evidence can  
 8 only be considered on direct appeal, not in habeas proceedings."  
 9 Carter v. Giurbino, 385 F.3d 1194, 1196 (9th Cir. 2004); see also  
 10 Kim v. Villalobos, 799 F.2d 1317, 1319 (9th Cir. 1986) (Lindley  
 11 "holds that the sufficiency of the evidence will not be reviewed  
 12 on habeas[.]"). The Lindley rule is an adequate and independent  
 13 state procedural ground.<sup>5</sup> Carter, 385 F.3d at 1197-98; see also  
 14 Warren v. Adams, 444 Fed. App'x 204, 206 (9th Cir. 2011) ("We have  
 15 recognized that a citation to Lindley, fairly read, stands for the  
 16 firmly established procedural rule that a claim of insufficiency  
 17 of the evidence must be brought on direct appeal – not in habeas  
 18 proceedings. In addition, we have held that the Lindley rule  
 19 constitutes an independent and adequate state ground to support a  
 20 judgment." (citation omitted)).

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21 <sup>5</sup> The California Supreme Court's citation to multiple cases does  
 22 not render its Order ambiguous. Cf. Valerio v. Crawford, 306 F.3d  
 23 742, 774-75 (9th Cir. 2002) (en banc) (A "procedural default based  
 24 on an ambiguous order that does not clearly rest on independent  
 25 and adequate state grounds is not sufficient to preclude federal  
 26 collateral review." (citation and internal quotation marks  
 27 omitted)). Petitioner raised only one sufficiency of the evidence  
 28 claim – Ground One – before the California Supreme Court, and the  
Lindley citation clearly relates to that claim. Warren v. Adams,  
 444 Fed. App'x 204, 206 (9th Cir. 2011); see also Nero v. Vazquez,  
 2014 WL 1289723, \*4 n.3 (C.D. Cal. 2014) ("[T]he Court is able to  
 ascertain that the Lindley bar clearly applies to Ground Five –  
 the only claim raising insufficiency of the evidence. . . .").

1 Because Respondent has adequately pled the affirmative defense  
2 of procedural bar, the burden now shifts to Petitioner to place  
3 the affirmative defense in issue. King, 464 F.3d at 966-67;  
4 Bennett, 322 F.3d at 586. "In most circumstances, the best method  
5 for petitioners to place the defense in issue is to assert 'specific  
6 factual allegations that demonstrate the inadequacy of the state  
7 procedure' by citing relevant cases." King, 464 F.3d at 967  
8 (quoting Bennett, 322 F.3d at 586). Petitioner has not done this.  
9 Thus, Petitioner has not met his burden, Ortiz v. Stewart, 149 F.3d  
10 923, 932 (9th Cir. 1998), and he has procedurally defaulted Ground  
11 One.<sup>6</sup> Cunningham v. Wong, 704 F.3d 1143, 1155 (9th Cir 2013);  
12 Carter, 385 F.3d at 1198.

13  
14 When a habeas petitioner "has defaulted his federal claim[]  
15 in state court pursuant to an independent and adequate state  
16 procedural rule, federal habeas review of the claim[] is barred  
17 unless the prisoner can demonstrate cause for the default and  
18 actual prejudice as a result of the alleged violation of federal  
19 law, or demonstrate that failure to consider the claims will result  
20 in a fundamental miscarriage of justice." Coleman, 501 U.S. at

21  
22 <sup>6</sup> In addition to Lindley, the California Supreme Court also denied  
23 Petitioner's state habeas petition with citation to, inter alia,  
24 In re Waltreus, 62 Cal. 2d 218, 225 (1965). Waltreus "holds that  
25 issues actually raised and rejected on appeal cannot be raised anew  
26 in a state petition for writ of habeas corpus." Carter, 385 F.3d  
27 at 1198; Hill v. Roe, 321 F.3d 787, 789 (9th Cir. 2003). Here,  
28 Ground One was the only claim raised on direct appeal. (See  
Lodgments 2, 6). Accordingly, the Court agrees with Respondent  
that the Waltreus citation applies to Ground One. (See Mot. Mem.  
at 11-13). However, because the Court has already determined that  
the California Supreme Court's Lindley citation bars Ground One,  
it is unnecessary to consider Respondent's contention that Waltreus  
also bars Ground One. (See id.).

1 750; Medley v. Runnels, 506 F.3d 857, 869 (9th Cir. 2007) (en  
2 banc). "Cause for a procedural default exists where something  
3 external to the petitioner, something that cannot fairly be  
4 attributed to him, . . . impeded his efforts to comply with the  
5 State's procedural rule." Maples v. Thomas, 132 S. Ct. 912, 922  
6 (2012) (citation, internal quotation marks and brackets omitted;  
7 italics in original); Coleman, 501 U.S. at 753. "A habeas  
8 petitioner demonstrates prejudice by establishing that the  
9 constitutional errors 'worked to his actual and substantial  
10 disadvantage, infecting his entire trial with error of  
11 constitutional dimensions.'" Schneider v. McDaniel, 674 F.3d 1144,  
12 1153 (9th Cir. 2012) (quoting United States v. Frady, 456 U.S. 152,  
13 170 (1982)); Sexton v. Cozner, 679 F.3d 1150, 1158 (9th Cir. 2012).  
14 Petitioner has the burden of proving both cause and prejudice.  
15 Bousley v. United States, 523 U.S. 614, 622 (1998); Coleman, 501  
16 U.S. at 750. Finally, to qualify for the "fundamental miscarriage  
17 of justice" exception to the procedural default rule, Petitioner  
18 must "show that 'a constitutional violation has probably resulted  
19 in the conviction of one who is actually innocent.'" Schlup v.  
20 Delo, 513 U.S. 298, 327 (1995) (quoting Murray v. Carrier, 477 U.S.  
21 478, 496 (1986)); Wood v. Ryan, 693 F.3d 1104, 1117 (9th Cir.  
22 2012). Petitioner has not attempted to meet these standards. As  
23 such, Ground One is procedurally barred.

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**B. Grounds Two And Three Are Unexhausted and Meritless**

Respondent contends Grounds Two and Three are unexhausted and must be dismissed. (Mot. Mem. at 2-10). The Court agrees that these claims are unexhausted.<sup>7</sup> The Court has also reviewed Grounds Two and Three de novo, see Scott v. Ryan, 686 F.3d 1130, 1133 (9th Cir. 2013) ("Where, as here, there is no state court decision on the merits, the district court reviews the merits de novo."); Lewis v. Mayle, 391 F.3d 989, 996 (9th Cir. 2004) ("De novo review, rather than AEDPA's deferential standard, is applicable to a claim that the state court did not reach on the merits."), and determined they must be dismissed as meritless. See 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."); Cassett v.

<sup>7</sup> Ground Three(c) is unexhausted because Petitioner did not raise it in his habeas corpus petition to the California Supreme Court. (See Lodgment 3); see also Pappageorge v. Sumner, 688 F.2d 1294, 1294 (9th Cir. 1982) (ineffective assistance of counsel claim not raised in state court was unexhausted). Petitioner raised Grounds Two, Three(a-b), and Three(d) in his habeas corpus petition to the California Supreme Court. (Lodgment 7). However, the California Supreme Court denied these claims with citation to People v. Duvall, 9 Cal. 4th 464, 474 (1949) and In re Swain, 34 Cal. 2d 300, 304 (1949), signifying the claims were dismissed with leave to amend because they had not been pled with sufficient particularity. See Curiel v. Miller, 830 F.3d 864, 869 (9th Cir. 2016) (en banc) ("We understand the California Supreme Court's denial of a habeas petition with citations to Swain and Duvall in conjunction as, 'in effect, the grant of a demurrer, i.e., a holding that [the petitioner] ha[s] not pled facts with sufficient particularity.'" (citations omitted)); Seeboth v. Allenby, 789 F.3d 1099, 1104 n.3 (9th Cir. 2015) ("[C]itation to Duvall and Swain together constitutes 'dismissal without prejudice, with leave to amend to plead required facts with particularity.'"), cert. denied, 136 S. Ct. 1168 (2016).

1 Stewart, 406 F.3d 614, 623-24 (9th Cir. 2005) (“[A] federal court  
2 may deny an unexhausted petition on the merits only when it is  
3 perfectly clear that the applicant does not raise even a colorable  
4 federal claim.”).

5  
6 **1. Petitioner’s Perjured Testimony Claim Is Meritless**

7  
8 In Ground Two, Petitioner alleges he was denied due process  
9 of law because the prosecution’s key witness – victim Nicole D. –  
10 perjured herself. (Petition at 31-53). More particularly,  
11 Petitioner alleges Nicole D. testified under oath that she lied  
12 about the incident that led to Petitioner’s arrest because she and  
13 Petitioner’s family had been trying to get Petitioner help for his  
14 drug abuse. (Id.).

15  
16 A “conviction obtained by the [prosecutor’s] knowing use of  
17 perjured testimony is fundamentally unfair, and must be set aside  
18 if there is any reasonable likelihood that the false testimony  
19 could have affected the judgment of the jury.” United States v.  
20 Agurs, 427 U.S. 97, 103 (1976) (footnotes omitted); see also Giglio  
21 v. United States, 405 U.S. 150, 153 (1972) (“[D]eliberate deception  
22 of a court and jurors by the presentation of known false evidence  
23 is incompatible with ‘rudimentary demands of justice.’”); Miller  
24 v. Pate, 386 U.S. 1, 7 (1967) (“[T]he Fourteenth Amendment cannot  
25 tolerate a state criminal conviction obtained by the knowing use  
26 of false evidence.”); Napue v. Illinois, 360 U.S. 264, 269 (1959)  
27 (“[I]t is established that a conviction obtained through use of  
28 false evidence, known to be such by representatives of the State,

1 must fall under the Fourteenth Amendment[.]"). Moreover, "[a]  
2 prosecutor . . . has a constitutional duty to correct evidence he  
3 or she knows is false, even if it was not intentionally submitted."  
4 Mancuso v. Olivarez, 292 F.3d 939, 957 (9th Cir. 2002); Napue, 360  
5 U.S. at 269; Hayes v. Brown, 399 F.3d 972, 978 (9th Cir. 2005) (en  
6 banc). "To prevail on a [false evidence] claim, 'the petitioner  
7 must show that (1) the testimony (or evidence) was actually false,  
8 (2) the prosecution knew or should have known that the testimony  
9 [or evidence] was actually false, and (3) that the false testimony  
10 [or evidence] was material.'" Hein v. Sullivan, 601 F.3d 897, 908  
11 (9th Cir. 2010); Napue, 360 U.S. at 269.

12  
13 Petitioner cannot meet this standard. Petitioner has not  
14 shown Nicole D. testified falsely at trial. Instead, Petitioner  
15 relies on Nicole D.'s trial testimony to highlight inconsistencies  
16 between her trial testimony and statements she previously made to  
17 the police and at the preliminary hearing. (See Petition at 33-  
18 53). For instance, while Nicole D. acknowledged she told police  
19 that Petitioner grabbed her around the neck and punched her in the  
20 face, her trial testimony was less certain as to whether it was  
21 Petitioner's fist or her phone that struck her in the face after  
22 Petitioner lunged at her and grabbed her around the neck.<sup>8</sup> (RT

23  
24 <sup>8</sup> Nicole D. testified that on June 4, 2012, she had an altercation  
25 with Petitioner, who she described as a bipolar schizophrenic who  
26 was self-medicating with methamphetamine. (RT 615-19, 662, 670).  
27 Nicole D. stated she was on the phone to Petitioner's mother when  
28 Petitioner, who had been gone for four days, returned home, ran  
into her bedroom looking crazed and started jumping up and down.  
(RT 617-21). Petitioner then lurched toward Nicole and grabbed  
her around the neck, after which either Petitioner or the phone  
she was holding struck her in the face. (RT 621-28).

1 619-28, 633-34, 655, 676-77, 690). Nicole D. also testified she  
 2 was afraid Petitioner was going to kill her during their  
 3 altercation, but he did not say he was going to kill her, which  
 4 she acknowledged was contrary to statements she made to the police  
 5 and at the preliminary hearing.<sup>9</sup> (RT 628-30, 636-37, 681-84).  
 6 However, "[t]he fact that a witness may have made an earlier  
 7 inconsistent statement . . . does not establish that the testimony  
 8 offered at trial was false."<sup>10</sup> United States v. Croft, 124 F.3d  
 9 1109, 1119 (9th Cir. 1997); see also United States v. Bingham, 653  
 10 F.3d 983, 995 (9th Cir. 2011) ("Bingham points to nothing in the  
 11 record that shows the intentional use of perjured testimony.  
 12 Certainly Miller made inconsistent statements, but that is not  
 13 enough for a Napue violation." (citations omitted)); United States  
 14 v. Necoechea, 986 F.2d 1273, 1281 (9th Cir. 1993) (no prosecutorial  
 15 misconduct when, "[a]t most, the prosecutor presented contradictory  
 16 testimony").

17  
 18 Furthermore, Petitioner has pointed to "nothing in the record  
 19 that shows the intentional use of perjured testimony." Bingham,

20 <sup>9</sup> Nicole D. testified at the preliminary hearing that Petitioner  
 21 told her "Keep it up and you're gonna die." (CT 9). The jury also  
 22 saw a video in which Nicole D. told a Sheriff's Deputy that  
 23 Petitioner "came in. He grabbed me by my throat. He threw me  
 down. Then, he socked me in my face. And, he told me that if he  
 is going to jail, he is going to kill me." (CT 64; RT 634-36).

24 <sup>10</sup> That Nicole D. might have tried to minimize Petitioner's  
 culpability at trial is unsurprising. "Victims of [domestic]  
 25 violence often are protective of, and deny allegations against,  
 their abusers." United States v. Carthen, 681 F.3d 94, 103 (2d  
 26 Cir. 2012); see also Johnson v. Hedgpeth, 2010 WL 1848165, \*5 (C.D.  
 27 Cal.) ("[I]t is far from uncommon that a victim of domestic abuse  
 28 recants her testimony in order to protect her abuser from the  
 consequences of his actions."), report and recommendation adopted  
by, 2010 WL 1854454 (C.D. Cal. 2010).

1 653 F.3d at 995; see also United States v. Williams, 547 F.3d 1187,  
2 1202 n.13 (9th Cir. 2008) ("Although there were inconsistencies in  
3 Penate's testimony, there was no evidence that the government  
4 knowingly presented false testimony. The inconsistencies in  
5 Penate's testimony were argued to the jury as the finder of fact."  
6 (citation omitted)); Mancuso, 292 F.3d at 957 (rejecting false  
7 evidence claim when there was "no evidence in this case that the  
8 prosecutor presented false testimony"); United States v. Sherlock,  
9 962 F.2d 1349, 1364 (9th Cir. 1992) (rejecting prosecutorial  
10 misconduct claim when "[t]he record does not show . . . the  
11 prosecutor used false testimony"). Accordingly, Ground Two is  
12 clearly without merit because Petitioner has "failed to show that  
13 [Nicole D.'s] testimony was 'actually false' or that the government  
14 knowingly presented false testimony." United States v. Houston,  
15 648 F.3d 806, 814 (9th Cir. 2011); see also Allen v. Woodford, 395  
16 F.3d 979, 995 (9th Cir. 2004) (rejecting perjured testimony claim  
17 when the petitioner "fail[ed] to establish either that [the  
18 witness'] testimony was false or that the State had any reason to  
19 believe it was false.").

20  
21 **2. Petitioner's Ineffective Assistance Of Counsel Claims**  
22 **Are Meritless**

23  
24 "The Sixth Amendment guarantees criminal defendants the  
25 effective assistance of counsel." Yarborough v. Gentry, 540 U.S.  
26 1, 4 (2003) (per curiam); see also Missouri v. Frye, 132 S. Ct.  
27 1399, 1404 (2012) ("The right to counsel is the right to effective  
28 assistance of counsel."). To succeed on an ineffective assistance

1 of trial counsel claim, Petitioner must demonstrate both that  
2 counsel's performance was deficient and that the deficient  
3 performance prejudiced the defense. Strickland v. Washington, 466  
4 U.S. 668, 687 (1984). "'To establish deficient performance, a  
5 person challenging a conviction must show that 'counsel's  
6 representation fell below an objective standard of  
7 reasonableness.'" Harrington v. Richter, 562 U.S. 86, 104 (2011)  
8 (citation omitted); Premo v. Moore, 562 U.S. 115, 121 (2011).  
9 Prejudice "focuses on the question whether counsel's deficient  
10 performance renders the results of the trial unreliable or the  
11 proceeding fundamentally unfair." Lockhart v. Fretwell, 506 U.S.  
12 364, 372 (1993); Williams v. Taylor, 529 U.S. 362, 393 n.17 (2000).  
13 That is, Petitioner must establish there is a "reasonable  
14 probability that, but for counsel's unprofessional errors, the  
15 result of the proceeding would have been different[,]" Strickland,  
16 466 U.S. at 694, and "[t]he likelihood of a different result must  
17 be substantial, not just conceivable." Richter, 562 U.S. at 112;  
18 Cullen v. Pinholster, 563 U.S. 170, 189 (2011). Petitioner bears  
19 the burden of establishing both components. Williams, 529 U.S. at  
20 390-91; Strickland, 466 U.S. at 687. However, the Court need not  
21 determine whether counsel's performance was deficient before  
22 examining the prejudice the alleged deficiencies caused Petitioner.  
23 See Smith v. Robbins, 528 U.S. 259, 286 n.14 (2000) ("'If it is  
24 easier to dispose of an ineffectiveness claim on the ground of lack  
25 of sufficient prejudice, . . . that course should be followed.'"   
26 (quoting Strickland, 466 U.S. at 697)).  
27  
28

1 In Ground Three(a), Petitioner complains his defense counsel  
2 failed to investigate or prepare for trial. (Petition at 54).  
3 While defense counsel has a "duty to make reasonable investigations  
4 or to make a reasonable decision that makes particular  
5 investigations unnecessary[,]” Strickland, 466 U.S. at 691; Wiggins  
6 v. Smith, 539 U.S. 510, 521 (2003), Petitioner does not explain  
7 what defense counsel failed to do or how he would have benefitted  
8 from further investigation. Accordingly, Petitioner’s “cursory  
9 and vague claim cannot support habeas relief.” Greenway v.  
10 Schriro, 653 F.3d 790, 804 (9th Cir. 2011); see also Sandgathe v.  
11 Maass, 314 F.3d 371, 379 (9th Cir. 2002) (affirming denial of  
12 ineffective assistance of counsel claim when petitioner presented  
13 no evidence in support of claim); Jones v. Gomez, 66 F.3d 199, 205  
14 (9th Cir. 1995) (The petitioner’s “conclusory suggestions that his  
15 trial . . . counsel provided ineffective assistance fall[s] far  
16 short of stating a valid claim of constitutional violation.”).

17  
18 In Ground Three(b), Petitioner asserts that he was denied the  
19 effective assistance of counsel when the public defender who  
20 represented him at trial, Denise Fujita, did not attend his  
21 preliminary hearing, but instead sent another public defender,  
22 Cornell Mimms, in her stead, and Mimms allegedly did not properly  
23 familiarize himself with Petitioner’s case or challenge “crucial  
24 parts” of Nicole D.’s preliminary hearing testimony.<sup>11</sup> (Petition

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25 <sup>11</sup> Among other deficiencies, there is no apparent factual basis  
26 for this claim because the record indicates that Mimms represented  
27 Petitioner at his preliminary hearing on June 18, 2012, and  
28 arraignment on July 2, 2012, and it was not until Petitioner’s  
pretrial conference on August 2, 2012, that Fujita first  
represented Petitioner. (CT 1-29, 35, 37); see Dows v. Wood, 211

1 at 54; see also CT 3-29). This claim fails because it is vague  
2 and conclusory, Greenway, 653 F.3d at 804; Jones, 66 F.3d at 205,  
3 and Petitioner has not shown he was in any manner prejudiced by  
4 Mimms's appearance at the preliminary hearing. Strickland, 466  
5 U.S. at 694; see also Miranda v. Horel, 2009 WL 2578920, \*9 (C.D.  
6 Cal. 2009) (denying ineffective assistance of counsel based on  
7 counsel sending an associate to various pre-trial hearings when  
8 "petitioner has neither alleged nor shown he was prejudiced by  
9 [associate counsel's] appearance on his behalf" (footnote  
10 omitted)).

11  
12 In Ground Three(c), Petitioner asserts he was denied the  
13 effective assistance of counsel when defense counsel did not object  
14 to or challenge the prosecution's presentation of Nicole D.'s  
15 perjured testimony. (Petition at 54). However, as discussed  
16 above, Petitioner has not shown that Nicole D. testified falsely  
17 at trial. Therefore, defense counsel did not render ineffective  
18 assistance in failing to object on this ground. See, e.g., Flournoy  
19 v. Small, 681 F.3d 1000, 1006 (9th Cir. 2012) ("The failure to make  
20 an objection that would have been overruled was not deficient  
21 performance."); Sexton, 679 F.3d at 1157 ("Counsel is not  
22 necessarily ineffective for failing to raise even a nonfrivolous  
23 claim, so clearly we cannot hold counsel ineffective for failing  
24 to raise a claim that is meritless." (citation omitted)).

25  
26 F.3d 480, 486-87 (9th Cir. 2000) (factually unfounded argument  
27 provides no basis for federal habeas relief). In any event, because  
28 the claim fails for the reasons discussed above, it is unnecessary  
to address these deficiencies further.

1 Finally, in Ground Three(d), Petitioner asserts defense  
2 counsel was ineffective in failing to seek a stay of proceedings  
3 to properly address and investigate "possible" out-of-court  
4 relations between the prosecutor and a Los Angeles County Sheriff's  
5 Deputy who was a witness in the case. (Petition at 54). However,  
6 Petitioner's allegations, which lack any evidentiary support, are  
7 vague, conclusory, speculative and manifestly insufficient to  
8 warrant habeas corpus relief. Greenway, 653 F.3d at 804;  
9 Sandgathe, 314 F.3d at 379; Jones, 66 F.3d at 205; see also Gonzalez  
10 v. Knowles, 515 F.3d 1006, 1016 (9th Cir. 2008) ("[S]peculation is  
11 plainly insufficient to establish [Strickland] prejudice.");  
12 Grisby v. Blodgett, 130 F.3d 365, 373 (9th Cir. 1997) (speculative  
13 claim of prejudice insufficient to satisfy Strickland standard).  
14 Accordingly, Ground Three is meritless.

15  
16 **VI.**

17 **CONCLUSION**

18  
19 For the foregoing reasons, the Petition for Writ of Habeas  
20 Corpus is DENIED and Judgment shall be entered dismissing this  
21 action with prejudice.

22  
23 DATED: January 30, 2017

24 /s/  
SUZANNE H. SEGAL  
25 UNITED STATES MAGISTRATE JUDGE  
26  
27  
28